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Supreme Court, U.S.
FILED
07-234 AUG 21 2007
OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

NED B. MAJORS,

Petitioner,

v.

SOUTH CAROLINA SECURITIES COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF SOUTH CAROLINA

PETITION FOR WRIT OF CERTIORARI

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August 21, 2007

QUESTIONS PRESENTED FOR REVIEW

PREFACE:

United States Code, Title 15 §77(b) has caused, and still is causing, various different and, therefore, controversial Federal and State Court Opinions in almost every State because Title 15 §77(b)'s lack of specifically defining an obscure "security" called "Investment Contracts". Petitioner urges this Highest Honorable Court to take this case, if only *to specifically, in detail, once and for all,* define the "elements" or "prongs" of a Title 15 §77(b) "Investment Contract".

The urgency of Petitioner's above request is exemplified in this very simple case as even this very simple case concerns the United States Constitution's Article I, §9[3] and §10[1] (prohibition of "passing *ex post facto* laws"); the United States Constitution's XIV(§1) ("due process rights") Amendment, and, its V ("double jeopardy rights") Amend plus South Carolina Constitution's, Article I §3 (due process rights); Article I, §22 (prohibition of the same person being both the Prosecutor and the Adjudicator) and South Carolina's Appellate Court Rules (SCACR), Professional Conduct Rule 3.5(a) of Rule 407 ("prohibition of influencing Hearing Officials") and Rule 3.5(b) of Rule 407 ("prohibition of *ex parte* conversations between Parties and Hearing Officials"); plus,

Although presently a Civil matter, Criminal Indictments against Petitioner could occur unless this Honorable Court grants this Writ and then reverses the South Carolina Supreme Court's Opinion that Petitioner's Individually Contracted "Agency Contract" (an Agency-For-Hire Contract wherein only Labor is offered or sold

to each individual Employer/Principal) is the "offering or selling of unregistered securities" in the form of United States Code, Title 15§77(b), "Investment Contracts", an illegal activity in all states, but unlike most other states, the South Carolina Securities Commission's Commissioner (Respondent) is also The Attorney General of South Carolina in charge of criminally prosecuting such illegal "offering or selling of unregistered securities".

1. Whether the South Carolina Supreme Court erred when it opined that when Petitioner's individual Employer/Principal paid Petitioner a Non-Refundable Agency Fee it was an "investment of money" (the first of three elements or prongs making up "securities" called Investment Contracts) and, therefore, a "security" under Title 15 U.S.C. §77(b) and S.C. Code Ann. §35-1-20(15) by ignoring this Honorable Court's Opinion in *SEC v. Energy Group Of America, Inc.* ("EGA"), 459 F. Supp. 1234 (1978) which opined, "paying a fee can not be considered an investment as the payer knows a fee is not an investment as they do not expect to get it back."?

2. Whether The State of South Carolina Supreme Court erred when it judicially created an United States Constitution's Article I, §10[1] prohibited *ex post facto* Law in South Carolina by applying a newly enacted (Republican Party controlled Legislature's written Uniform Securities Act of 2005) Year 2006 Securities Law", which repealed the (Democratic Party controlled Legislature's written) Year 2002 "Securities" Law in effect in Year 2003, to issue its Opinion that the new Year 2006 "Securities" Law gave Respondent the constitutional authority to issue its Year 2003 *ex parte* *"(First) Order to Cease and Desist Selling Unregistered Securities (a crime), and Engaging in Securities Fraud*

(a criminal felony), and Notice of Right to a Hearing" against Petitioner to *ex post facto* retrospectively alter the legal consequences of Petitioner's, previous to September 9, 2003, acts to his disadvantage?

3. Whether the South Carolina Supreme Court erred when it opined that Petitioner's United States' Constitution's XIV (§1) Amendment; South Carolina Constitution's, Article I (§3); and South Carolina Code of Laws §35-1-1480 "Due Process Rights" were not violated when Respondent (Securities Commissioner/Attorney General) issued its *ex parte "(First) Order To Cease and Desist Selling Unregistered Securities* (a crime) *and Engaging in Securities Fraud* (a criminal felony), *and Notice of Right to a Hearing"* against Petitioner without first giving Petitioner his United States and South Carolina Constitutionally required prior Notice and Hearing?

4. Whether the South Carolina Supreme Court erred when it opined that the Respondent (Securities Commissioner/Attorney General) did not act as both the Prosecutor and Adjudicator and, therefore, did not violate Article 1, §22 of the South Carolina Constitution?

5. Whether the South Carolina Supreme Court erred when it ignored that Respondent violated Petitioner's Due Process rights when Respondent's Commissioner had a private, *ex parte,* meeting with the Administrative Agency's Hearing Officer (prohibited by Rule 3.5(b) of Professional Conduct Rule 407 of the South Carolina Appellate Court Rules) on the second business day after Petitioner's, finally held, South Carolina's Constitutionally required Article I, §22 Due Process Hearing had concluded but still over two (2) months before the Hearing Officer's *"Report and Recommendation"* was only *ex parte* issued to Respondent's Commissioner,

pursuant to Respondent's Commissioner's verbal Order to the Hearing Officer (probably prohibited by Rule 3.5(a) of Rule 407, SCACR) during their above referenced private, *ex parte*, meeting?

6. Whether the South Carolina Supreme Court erred in its Year 2007 Opinion by applying a newly enacted Year 2006 (Republican Party controlled Legislature's written) Securities Law to "lend guidance" to interpreting the repealed (but in effect when this Year 2003 case started) Year 2002 (Democratic Party controlled Legislature's written) Securities Law to opine, "Clearly, it appears the (Year 2005/2006) Legislature intends a Strict Vertical Commonality Test to apply." after which the Court then opined that such (new) Test made Petitioner's "Agency Contract" (Agency-For-Hire) a "common enterprise" (the second of three elements or prongs making up "securities" called Investment Contracts) and, therefore, a "security" under Title 15 U.S.C. §77(b) and S.C. Code Ann. §35-1-20(15) and ***ex post facto*** retrospectively changed the legal consequences of Petitioner's previous acts to his detriment?

7. Whether the South Carolina Supreme Court erred when it opined that Petitioner's marketing material stating, "we do all the work" meant Petitioner made the "essential managerial efforts which affect the failure or success of the enterprise" (the third of three elements or prongs making up "securities" called Investment Contracts) and, therefore, a "security" under Title 15 U.S.C. §77(b) and S.C. Code Ann. §35-1-20(15)?

CORPORATE DISCLOSURE STATEMENT

Petitioner Ned B. Majors, Pro se, and Tax Lien Agents, Inc., a South Carolina corporation, were the only two (2) Appellants/Petitioners in this matter when it was before the South Carolina Supreme Court but unfortunately, Tax Lien Agents, Inc. will not be a co-Petitioner in this matter because of a still pending May 26, 2006 filed Divorce case wherein Petitioner's estranged wife's Attorney petitioned and received a Charleston County, South Carolina, Family Court Judge's Order on April 23, 2007 appointing a Receiver to run Tax Lien Agents, Inc. and said Receiver has stated that Tax Lien Agents, Inc. does not have the funds to hire an Attorney to prepare and file any Writ of Certiorari to the United States Supreme Court.

As to Tax Lien Agents, Inc. there is no parent or publicly held company owning 10% or more of Tax Lien Agents, Inc.'s stock as Petitioner Ned B. Majors was/is Tax Lien Agents, Inc.'s Founder, President, Chief Executive Officer and Sole Shareholder pending the Charleston County, South Carolina, Family Court's Divorce Decree which, unfortunately, is not expected to occur until sometime in late Year 2007 or early Year 2008.

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South Carolina Supreme Court Opinion No. 26317 filed April 23, 2007.

Horry County Circuit Court Judge James E. Lockemy's Order of October 27, 2004.

Respondent's *"Final Order to Cease and Desist Selling Unregistered Securities"* issued on February 11, 2004.

Administrative Hearing Officer's *"Report and Recommendation"* issued January 13, 2004.

Respondent's *(First) "Order to Cease and Desist Selling Unregistered Securities and Engaging in Securities Fraud, and Notice of Right to a Hearing"* issued on September 9, 2003.

Appeal from: *Ned B. Majors and Tax Lien Agents, Inc. v. South Carolina Securities Commission,* Published Opinion No. 26317 (S.C. Supreme Court April 23, 2007) (App. A, p. 1a). Rehearing denied May 23, 2007 (App. C, p. 63a).

BASIS FOR JURISDICTION

Petitioner seeks review of the South Carolina Supreme Court's Opinion No. 26317 filed on April 23, 2007 with Petitioner's Request for Rehearing denied on May 23, 2007. This Court has jurisdiction over this matter pur-

suant to Article III, Section 2 of the Constitution of the United States.

STATUTES INVOLVED IN THIS ACTION

This action involves many statutes as listed in Petitioner's Table of Cited Authorities, but the primary ones are:

1. The U.S. Constitution's Article I, Section 9[3] which, in pertinent parts, states,

> "No . . . *ex post facto* Law shall be passed"

2. The U.S. Constitution's Article I, Section 10[1] which, in pertinent parts, states,

> "No State shall . . . pass . . . any *ex post facto* Law. . ."

3. United States Code, Title 15 §77(b) states an Investment Contract is one type of many types of items called a "security".

4. South Carolina Code Ann. §35-1-20(15), with extensive language defining "securities".

5. South Carolina Constitution's Article 1, Section 22, which in pertinent parts, states,

> "No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting the private rights except on due notice and an opportunity be heard, nor shall he be subject to the same person for both prosecution and adjudication . . ."

6. South Carolina Code of Laws 1976 Annotated Title 35, Securities Chapter 1, Uniform Securities Act Article 13, Enforcement, Remedies, Liabilities and Penalties

(*current through end of 2003 Reg. Sess.*) §35-1-1480, which in pertinent parts states:

> "Whenever it appears to the securities commissioner (Respondent) that any person has engaged . . . in any act or practice constituting a violation of . . . this (securities) chapter . . . he may in his discretion bring an action [rule to show cause] in the court of common pleas . . . to enjoin the acts or practices." (App. H, p. 108a)

7. South Carolina Code of Laws 1976 Annotated Title 35, Securities Chapter 1, Uniform Securities Act Article 3. Exempt Securities and Transactions (*current through end of 2003 Reg. Sess.*) §35-1-330 (App. I, p. 109a), which, in pertinent part, states:

> "The securities commissioner (Respondent) may by order deny or revoke any exemption . . . with respect to a specific security or transaction. ***No such order may be entered without appropriate prior notice*** to all interested parties, opportunity for hearing . . ." (Bold type added for emphasis).

8. United States Constitution XIV (§1) Amendment (Due Process rights)

9. United States Constitution V Amendment (no Double Jeopardy)

10. S.C. Appellate Court Rules, Professional Conduct Rule 3.5(a) and (b) of Rule 407 (SCACR) (App. J, p. 111a) which, in pertinent parts, states:

> "A lawyer shall not:
>
> "(a) seek to influence a judge . . . or other official . . ."
>
> "(b) communicate ***ex parte*** with such a person during the proceeding." (Bold type added for emphasis).

STATEMENT OF THE CASE

Petitioner Ned B. Majors, in late Year 1999, started his "Agency-for-Hire" business arrangement wherein his solely owned South Carolina corporation, Tax Lien Agents, Inc. ("TLA") (see Corporate Disclosure Statement page), serving strictly as an Individually Contracted Employee/Agent by offering and selling only its employees' physical Labor and personal service to an individual Employer/Principal who desires to hire Petitioner's corporation and, thus, its employees to do the extensive nationwide travel required to attend various Government delinquent *ad valorem* real property Tax Lien Auctions. At those Government auctions, pursuant to its Employer's specific criteria, Petitioner bids on and then facilitates the purchase of Government sold real property Tax Liens directly for that individual Employer/Principal by handing that individual Principal's FDIC Bank Cashier Check(s), made payable only to the selling Government's Treasurer, directly to a Government employee. Because Petitioner is only an Employee/Agent, the Employer/Principal never invests in Petitioner and Petitioner never has use of his Employer's/Principal's investment money.

Once the selling Government receives that employer's/principal's/*now* Purchaser's check, that Government issues an 8% to 25% APR (% depends on State Law) Interest bearing Tax Lien Certificate to that individual Principal/Purchaser and records that Tax Lien Certificate (and the fact that that individual Purchaser owns that particular Tax Lien Certificate) in the County's official real property land records as each such Tax Lien Certificate) in the County's official real property land records as each such Tax Lien Certificate ("TLC") is secured by the real property which caused the property taxes to

occur. Such real property is usually worth much more than the actual cost of the TLC because the TLC's cost is usually only the amount of delinquent *as valorem* (a percentage of the value of the property) property taxes owed.

By State Law, once the TLC is recorded, only two (2) things can happen:

(1.) The TLC is redeemed (paid off by the delinquent taxpayer, their mortgage company or any real party of interest) by the redeemer paying the Government the delinquent property tax amount owed plus the 8% to 25% APR accrued Interest owed. Then the Government recalls/voids the TLC by sending back the Purchaser's TLC's cost plus the 8% to 25% APR earned interest it received from the redeemer; **OR**

(2) After a period of time, usually ranging from one (1) to three (3) years, the TLC matures and the Government recalls it and, in its place, the Government issued a Tax Deed, on the property that had been securing the TLC, and the Government officially records that Deed in its property land records so everyone is on notice that **only that individual Purchaser owns that property**.

Once the Deed is recorded then, according to Petitioner's "Agency Contract (App. B, pp. 57a-62a), its Employer/Principal "shall commence good faith efforts to quiet the title and sell such property". True, while many Principals utilize Petitioner's labor to assist them, some Principals do it themselves or engage others to accomplish these obligations. Moreover, and most importantly, every Principal has the absolute and unqualified contractual right to engage its own services and resources in order to accomplish these obligations; plus, **remember**, both the purchased TLC and any resultant property *Deed*

is recorded only in the Principal's name by the Government. Thus, as Attorneys, all of the Justices on this Honorable U.S. Supreme Court's Bench know there is no legal way an Employee/Agent could: (A.) "list" someone else's property with a Realtor; (B.) "set" the final property's sale price; (C.) "sign" the Sales Contract; (D.) "hire" an attorney to file the Quiet Title law suit; or, (E.) "hire" a Closing Attorney to close the sale for the Principal - much less (F.) "sign" the Deed transferring the property's ownership from the Principal over to the Buyer! – as those professional individuals would not let an Agent actually hire them as all require the Principal's/Seller's signature to be witnessed and some require the Seller's signature to be notarized by a Notary! Thus, contrary to the S.C. Supreme Court's opinion (Opinion, P. 13, Par. 2), by common and statute Law, it is the Principal who must make all essential, significant managerial decisions, never its Employee/Agent (Petitioner).

Once the Principal sells the property and Petitioner's Employer/Principal/*now* Property Seller has deducted all of their TLC cost and expenses from the property's net sale proceeds received, the Employer/Principal/Property Seller pays Petitioner's company a Performance Bonus equal to fifty percent (50%) of that left over "net" profit.

Respondent, South Carolina Securities Commission ("Commission"), is an administrative agency of the government of the State of South Carolina. Pursuant to the South Carolina Uniform Securities Act, S.C. Code Ann. §35-1-10, *et seq.*, the Commission is charged with the jurisdiction and responsibility of regulating the offering and sale of "securities" within the State of South Carolina. By law, the Commission is a division of The

Office of Attorney General and The Attorney General of South Carolina is the Commission's Commissioner.

Therefore, when the Commission commences any legal action against any person or legal entity it suspects has violated any provisions of the "Securities" Act, it is The Attorney General who controls the "Prosecution" of that individual or entity and it is The Attorney General, as the Securities Commissioner, who "Adjudicates" the matter at the agency level.

In Year 2000, under a previous Administration and Commissioner, Respondent started an inquiry investigation of Petitioner and Tax Lien Agents, Inc. ("TLA") for possible "securities" violations. After Petitioner supplied Respondent's investigator with previously received favorable (No Action type) letters, concerning Petitioner's Individually Contracted Tax Lien purchasing "Agency-for-Hire" business, from United States Securities and Exchange Commission (SEC) plus Securities Commissions of California and Georgia (App. L, p. 116a) and answered all of Respondent's questions, Petitioner heard nothing more from, then, Respondent.

Almost three (3) years later, on February 14, 2003, Respondent, under a new Administration, served an overly broad Subpoena Duces Tecum (R, p. 510, lines 16-p. 511, p. 2) upon Petitioner and, after submitting to a mid March, 2003 all day sworn interrogation by Tracy Meyers, Assistant Attorney General in charge of Securities Enforcement/Prosecution, Petitioner heard nothing more from Respondent even though Petitioner wrote Mrs. Meyers several times requesting information and a "No Action" type letter as Petitioner had always gotten one before.

Heard nothing more that is until September 9, 2003 when Henry McMaster, the new South Carolina Attorney General in his capacity as the new Securities Commissioner and Tracy A. Meyers, Assistant Attorney General, on behalf of Respondent, co-signed and *ex parte* issued, without prior Notice or a Hearing, Respondent's *"(First) Order to Cease and Desist Selling Unregistered Securities* (a crime) *and Engaging in Securities Fraud* (a criminal felony), *and Notice of Right to a Hearing"* which contained no fewer than 62 specific Findings of Fact and, without a Hearing or any input from Petitioner, contained 21 Conclusions of Law (R. pp. 1-8) against Petitioner and TLA which effectively caused Petitioner to immediately shut TLA, his "Agency-For-Hire" business, down throughout the United States as an on-going business.

On October 15, 2003, while preserving his assertion that the Commission's entire process in this matter violated Petitioner's "Due Process" rights, Petitioner requested a Hearing (R. pp. 180-181) and such Hearing was held on October 30 and 31, 2003 with G. Marcus Knight presiding. On January 13, 2004, Hearing Officer Knight *ex parte*[1] issued his *"Report and Recommendation of Hearing Officer"* (R. pp. 9-29), pursuant to Commissioner's Order, directly to the Respondent's Commissioner who later copied it and forwarded it to Petitioner.

On February 11, 2004, Respondent's Commissioner issued his *"Final Order to Cease and Desist Selling*

[1]Hearing Officer's November 4, 2003 Letter (App. G, p. 106a) abour Respondent's Commissioner's private, *ex parte*, meeting with him (on the 2nd. business day after Petitioner's "Due Process" Hearing had concluded) proves Respondent violated Petitioner's Due Process Rights. (Petitioner believes Mr. Knight's "tone" in his letter proves he was also improperly influenced).

Unregistered Securities" (R. pp. 30-49) with Findings of Fact and Conclusions of Law similar to those in his *"(First) Order to Cease and Desist"*, but does not indicate that the Commissioner reviewed Mr. Knight's *Report and Recommendation,* nor does it indicate that the Findings of Fact or Conclusions of Law are in any way based upon his review of Mr. Knight's *Report and Recommendation.* But, the Commissioner's *Final Order* did add certain, legally detrimental to Petitioner, Findings not set forth in Mr. Knight's *Report and Recommendation,* plus, the Commissioner left out all of Hearing Officer McKnight's *Report and Recommendation* favorable comments and recommendations about Petitioner, except the Commissioner's *Final Order* did find that Petitioner had not engaged in Securities Fraud (Op. P. 3, Last line) as the Commissioner's *(First) Order to Cease and Desist* had declared therein.

Petitioner timely appealed Respondent's *Final Order* to the Court of Common Pleas and on July 14, 2004, Judge James F. Lockemy heard the Appeal. On October 27, 2004, despite Judge Lockemy's stated "Due Process" concerns about Respondent's Commissioner's *(First) Cease and Desist Order* making conclusions of law and findings of fact before Respondent had a Hearing with input from both sides during the Appeal Hearing (R. p. 889-1137, especially p. 1129, lines 3-7 and p. 1131, lines 21- p. 1132, line 12). Judge Lockemy still Affirmed Respondent's Order (App. K, p. 113a). (i.e.: The Attorney General of S.C. has great influence and power)

Petitioner filed his Notice of Appeal to The South Carolina Court of Appeals on November 4, 2004. Just after all parties had filed their Final Briefs on or around December 5, 2005, without any known formal request by either party but pursuant to its Rule 204(b), SCACR,

The South Carolina Supreme Court certified the case so it could be moved from the Court of Appeals and be heard by The South Carolina Supreme Court instead.

Oral Arguments, with the Chief Justice of The Supreme Court, Jean Toal, presiding (and she was the only one who asked questions or made any comments from the Bench), were heard on November 14, 2006. Zane Wilson attended the Hearing in her capacity as the South Carolina Legislature Reporter for The Sun News of Myrtle Beach, South Carolina and subsequently, in The Sun News, authored a news article about the Hearing and indicated therein that Mr. Wilson thought Chief Justice Toal was very favorable towards Petitioner's position.

However, Justice John H. Waller, Jr. wrote The South Carolina Supreme Court's Opinion No. 26317 and Affirmed the lower court's order with Chief Justice Toal concurring, and the Opinion was filed on April 23, 2007.

Petitioner timely filed a Petition for Rehearing, but it was Denied on May 23, 2007.

ARGUMENT

1. Whether the South Carolina Supreme Court erred when it opined that when Petitioner's individual Employer/Principal paid Petitioner a Non-Refundable Agency Fee it was an "investment of money" (the first of three elements or prongs making up "securities" called Investment Contracts) and, therefore, a "security" under Title 15 U.S.C. §77(b) and S.C. Code Ann. §35-1-20(15) by ignoring this Honorable Court's Opinion in *SEC v. Energy Group Of America, Inc.* ("EGA"), 459 F. Supp. 1234 (1978) which opined, "paying a fee can not be considered an investment as the payer knows a fee is not an investment as they do not expect to get it back."?

Clearly, based on this own Honorable Court's opinion in EGA, *supra.*, the S.C. Supreme Court made reversible error when it opined, in pertinent parts, "It is indisputable that Principals . . . paid an up-front, non-refundable agency fee . . . They paid all fees and expenses . . . it cannot seriously be argued that Principals here did not make an investment of money." (Op. P. 9, Par. 4)

Thus, based on EGA, *supra,* which additionally opined, "[an] investment" typically involves parting with money for the purpose and in the reasonable expectation of making a profit . . . No capital contribution [i.e. Risk Capital] is intended nor is a return on capital intended when the customer pays the fee, the customer seeks only to avail himself of EGA's services." the first required element or prong of an Investment Contract, "an investment of money", does not exist in Petitioner's case.

Therefore, based on the Court's Opinion in *SEC v. ETS Payphones, Inc.,* ("ETS"), 300 F.3d 281; 2002 U.S. App. LEXIS 15766; Fed. Sec. L. Rep. (CCH) P91, 95115 Fla. L. Weekly Fed. C865. (Decided August 6, 2002) that **every one (1) of three (3) elements** of *Howey, infra.* [which are: (1) an investment of money (2) in a common enterprise (3) with Expectation of derived solely or primarily by the efforts of others] **must be present in order to be an Investment Contract and, if one [1] is not fully satisfied [such as "no investment of money" as in Petitioner's case] then there is no Investment Contract'** and this Honorable Court must reverse the S.C. Supreme Court's Opinion No. 26317 as Petitioner could not be offering or selling unregistered "securities" called Investment Contracts.

2. Whether The State of South Carolina Supreme Court erred when it used its authority to judicially create

an United States Constitution's Article I, §10[1] prohibited *ex post facto* Law in South Carolina by applying a newly enacted (Republican) Year 2006 "Securities" Law, which repealed the (Democratic) Year 2002 "Securities" Law in effect in Year 2003, to issue its Opinion that the new Year 2006 "Securities" Law gave Respondent the constitutional authority to issue its Year 2003 *ex parte "(First) Order to Cease and Desist Selling Unregistered Securities (a crime), and Engaging in Securities Fraud (a criminal felony), and Notice of Right to a Hearing"* against Petitioner to *ex post facto* retrospectively alter the legal consequences of Petitioner's, previous to September 9, 2003, acts to his disadvantage?

As to his argument on the above question, Petitioner requests that this Honorable High Court take Judicial Notice that some of the basic facts are: (A.) The United States Constitution's Article I, §10[1], in pertinent parts, states, "No State shall . . . pass any . . . *ex post facto* Law"; (B.) Black's Law Dictionary ("Black's") defines "Pass" as: "emanating from authority"; (C.) Black's defines "emanating" as: "to issue"; (D.) Black's defines *ex post facto* Law as: "every law which, in relation to the offense or its consequences, alters the situation of a person to his disadvantage"; (E.) the *State* of South Carolina Supreme Court is the highest authority in South Carolina; (F.) The Respondent issued its *(First) Order to Cease and Desist* on September 9, 2003 (Opinion, P 3, Par. 2, Lines 1-4); (G.) The Court, in its Opinion, stated, "We find the newly revised [Year 2006] Securities Act lend guidance to resolution of this issue" (Opinion, P. 11, Par. 3 Lines 1-2). . . . "Clearly, it appears the [Year 2005] Legislature intends a Strict Vertical Commonality test to apply [in Year 2007 to Respondent's Year 2003 *(First) Order*]". (Opinion, P. 11,

Par. 5, Lines 1-2); (H.) When the Court applied the new Year 2006 Law to Petitioner's, previous to September 9, 2003, acts it retrospectively altered the legal consequences of those acts to Petitioner's disadvantage; and, (I.) Most importantly, to take Judicial Notice that Republicans and Democrats rarely agree on anything!

Based on just the above Judicially Noticed basic facts, The South Carolina Supreme Court clearly erred when it used its authority to judicially create an United States Constitution's Article I, §10[1] prohibited *ex post facto* Law in South Carolina!

Accordingly, for this reason alone, this case should be remanded back to the South Carolina Supreme Court for a determination as to the illegality of Petitioner's previous acts by only applying the Year 2002 "Securities" Law that was in effect when this case started on September 9, 2003.

3. Whether the South Carolina Supreme Court erred when it opined that Petitioner's United States' Constitution's XIV (§1) Amendment; South Carolina Constitution's Article I (§3) and South Carolina Code of Laws §35-1-1480 "Due Process Rights" were not violated when Respondent (Securities Commissioner/Attorney General) issued its *ex parte* "(First) Order to Cease and Desist Selling Unregistered Securities (a crime) and Engaging in Securities Fraud (a criminal felony), and Notice of Right to a Hearing" against Petitioner without first giving Petitioner his United States and South Carolina Constitutionally required prior Notice and Hearing?

A state agency (such as Respondent) created by statute can only take action and exercise powers that

have been expressly granted to it by South Carolina's General Assembly. *Medical Society of South Carolina v. Medical University of South Carolina*, 334 S.C. 270, 53 S.E.2d 352 (1999). Although courts generally give deference to an administrative agency's interpretation of a statute, where the plain language of a statute is contrary to an agency's interpretation, the court will reject the agency's interpretation. *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 581 S.E.2d 836 (S.C. 2003).

The South Carolina Supreme Court erred in its Opinion when it opined that Respondent had the authority to issue its *ex parte (First) Order to Cease and Desist* pursuant to S.C. Code Ann. §31-1-60 because it was amended in Year 1992 to permit the Commissioner (Respondent) to "make, amend, and rescind those rules, forms, and orders, including cease and desist orders . . ." (Opinion P. 5, Par. 2) because, by law, §31-1-60 is only applicable to those who had already sought registration under the Act or had sought exemption from registration under the Act and Petitioner had never sought registration nor had he sought exemption from registration under the Act as Petitioner, who only acted as an Individually Contracted Employee/ Agent was only offering and selling labor.

In fact, if The S.C. Supreme Court had seriously read Petitioner's Final Brief they would have read that such Brief stated that the S.C. Reporter's Comments on the "New Act" stated, "this provision is intended for use by the Attorney General (Securities Commissioner) against persons not subject to earlier provisions," i.e.: persons [like Petitioner] who have never tried to registration with or notified the Securities Commissioner that they fall within one of the many Exemptions to the securities Law.

Based on the above case and the, in effect on September 9, 2003, South Carolina statutes, Title 35, Securities Chapter 1, Uniform Securities Act, Article 3, §35-1-330 (Denial or revocation of certain exemption; notice; hearing summary orders) (App. I, p. 109a) and Article 13, §35-1-1480 (Power of securities commissioner to apply for injunction, mandamus or receiver) (App. H, p. 108a), the Respondent clearly had no authority to issue its September 9, 2003 *ex parte (First) Order to Cease and Desist* against Petitioner as Respondent had no jurisdiction over Petitioner wherein Respondent could use S.C. Code §35-1-60 as their authority for their *ex parte (First) Order to Cease and Desist.*

When this Honorable Court reviews S.C. Code §35-1-1480 (App. H, p. 108a) it will also clearly see that the only statutory authority Respondent had over Petitioner was S.C. Code §35-1-1480 which specifically sets up a statutory procedure, in the event the Respondent believes that the Act is not being followed or that someone or some entity is violating the Act, and that procedure only empowers the Respondent to "bring an action [Rule to Show Cause] in the court of common pleas . . . to enjoin the acts or practices [that appear to the Securities Commissioner to violate the uniform Securities Act] and to enforce compliance with this chapter or any rule or order hereunder."

In sum, had the Respondent followed the procedure mandated by the Act, the Respondent would not have been able to issue its *ex parte (First) Order to Cease and Desist* under after an impartial Circuit Court Judge had a hearing and allowed input from both sides and made a finding that Petitioner had violated the Act. This the Respondent did not do as even Circuit Court Judge James F. Lockemy, during Petitioner's Appeal Hearing on

Respondent's *ex parte (First) Order to Cease and Desist*, stated "Due Process" concerns about Respondent's Commissioner's *(First) Cease and Desist Order* making conclusions of law and findings of fact before Respondent had a Hearing with input from both sides during his Appeal Hearing (R. p. 889-1137, especially p. 1129, lines 3-7 and p. 1131, lines 21 - p. 1132, line 12) (App. K, pp. 112-115).

The Respondent's failure to employ the proper statutory procedure resulted in a process that violated Petitioner's constitutional rights to due process. The structure utilized by the Respondent constituted a *per se* violation of Petitioner's due process rights.

Accordingly, for this reason alone, this case should be reversed as, under our democracy, not even one Iota of due process violation can be tolerated in our civilized society.

4. Whether the South Carolina Supreme Court erred when it opined that the Respondent (Securities Commissioner/Attorney General) did not act as both the Prosecutor and Adjudicator and, therefore, did not violate Article 1, §22 of the South Carolina Constitution?

Respondent's September 9, 2003 *ex parte (First) Order to Cease and Desist* (R, pp. 1-8) on its face and in its contents clearly shows that the process used by Respondent violates Article I, Section 22 as, after an eight (8) month closed investigation, the Securities Commissioner (Respondent), as Investigator and Prosecutor in his above Order, charged Petitioner with no fewer than 30 specific violations of the South Carolina Securities Act (the "Act") and then Respondent, as also the Adjudicator, found 13 conclusions of law and, therein, as Adjudicator, Respondent made the following Ruling,

"[Petitioner] have engaged in acts or practices which violate Sections 35-1-410 and 35-1-810 of the Act" (R. p. 7, Par. 10) and the Respondent made the ultimate conclusion in his Order, "When [Respondent] made the material omissions and materially misleading statements[2], they violated Section 35-1-1210 of the Act and committed securities fraud." (R. p. 7, Par. #34) (App. E, p. 98a).

Respondent's actions and Order were a *per se* violation of Article 1, Section 22.

Further, and much clearer, proof that Respondent's actions were a *per se* violation of Article 1, Section 22 is provided in a Letter (R. p. 1957) written by Hearing Officer Knight to Petitioner over two (2) months before Officer Knight issued his *Report and Recommendation ex parte* to the Respondent's Commissioner/Attorney General as therein, the Respondent's own Administrative Hearing Officer wrote, "Based on my [*ex parte*] meeting with Attorney General McMaster [Respondent] today I have been instructed to deliver my report to him without providing a copy to you." (R. p. 1957) (App. G, p. 106a).

This Hearing Officer's letter is especially judicially noteworthy as it was written on November 2003 – just 2 business days after Appellants'/Petitioner's evi-

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[2] Respondent's own selected and appointed Administrative Hearing Officer, after a two day full evidentiary Hearing, in his January 13, 2004 official *'Report and Recommendation'* DID NOT conclude that Appellants/Petitioner made material misstatements or material omissions nor that Appellants/Petitioner committed securities fraud. (R, p. 25, last 8 lines in Par. 1 - p. 26, Pars. #2-#4).

dentiary Hearing had concluded and over two (2) months before he issued his *Report and Recommendation*!

In summary, the Administrative Hearing Officer's letter demonstrates:

(A) An *ex parte* meeting occurred between Respondent and the Hearing Officer; (R. p. 1957); and (B) The *Ex parte* meeting was held just 2 business days after Petitioner's 'alleged' due process Hearing had concluded; and (C) Respondent Ordered the Hearing Officer to not give anyone else a copy of the Hearing Officer's evidentiary findings' report; and, (D) Clearly proves The Attorney General, acting in his capacity as Securities Commissioner, was always in control of the entire quasi-judicial decision of Respondent's administrative agency's Prosecution and Adjudication of Petitioner.

Further implications of the direct violation of Article I, §22 by Respondent (Attorney General Henry McMaster acting in his capacity as Securities Commissioner) is that, when one compares Respondent's *Final Order To Cease and Desist* (R. pp. 30-49) with Respondent's own Hearing Officer's *'Report and Recommendation'* (R. pp. 9-29), one easily realizes that Respondent never mentions Respondent's own selected, appointed (his alter ego) Hearing Officer's exact opinions and recommendations in Respondent's *Final Order To Cease and Desist* and such obvious material omissions prove that, in Respondent's "Will To Win", **Respondent intentionally left out all of his Hearing Officer's lengthy Recommendations (all highly favoable to Petitioner)** on Page 18, Pars. 2-4. (App. B, pp. 54a-55a) (R. p. 26, Pars. #2 - #4)

Therefore, this Honorable Court should conclude, as Circuit Court Judge Lockemy concluded (R. p. 1131,

lines 21 - p. 1132, line 12), (App. K, pp. 113a-114a) Respondent's Due Process structure was flawed and that Respondent's proceeding against Petitioner was a clear *per se* violation of Petitioner's Due Process Rights as guaranteed by Article 1, §22 of The South Carolina Constitution. Unfortunately, Judge Lockemy didn't have the guts to rule against The Attorney General (Respondent) and went on to give Respondent "one *free* pass to violate someone's constitutional rights", but hopefully this Honorable Supreme Court does! (App. K, pp. 112a-115a).

For all the above reasons, this Honorable Court should reverse the South Carolina's Supreme Court's Opinion No. 26317.

5. Whether the South Carolina Supreme Court erred when it ignored that Respondent violated Petitioner's Due Process rights when Respondent's Commissioner had a private, *ex parte*, meeting with the Administrative Agency's Hearing Officer (prohibited by Rule 3.5(b) of Professional Conduct Rule 407 of South Carolina Appellate Court Rules) on the second business day after Petitioner's, finally held, South Carolina's Constitutionally required Article I, §22 Due Process Hearing had concluded but still over two (2) months before the Hearing Officer's "*Report and Recommendation*" was only *ex parte* issued to Respondent's Commissioner, pursuant to Respondent's Commissioner's verbal Order to the Hearing Officer (probably prohibited by Rule 3.5(a) of Rule 407, SCACR), during their above referenced private, *ex parte*, meeting?

As proof of the above, in the Appendix and also included in the S.C. Supreme Court's Record as Page 1957, Petitioner produces evidence of a Letter (App. G, pp.

106a-107a) written by Hearing Officer Knight to Petitioner on November 4, 2003 (over two (2) months) before Officer Knight issued his *Report and Recommendation ex parte* to the Respondent's Commissioner/ Attorney General as therein, the Respondent's own appointed **Administrative Hearing Officer Knight wrote, "Based on my [*ex parte*] meeting with Attorney General McMaster [Respondent] today I have been instructed to deliver my report to him without providing a copy to you."** (R. p. 1957) (App. G, pp. 106a-107a).

And based on the above evidence (Hearing Officer Knight's Letter, R. p. 1957) (App. G, pp. 106a-107a), the S.C. Supreme Court made reversible erred when it opined, "Moreover, contrary to TLA's [Petitioner's] contention, we find no due process violation in the SEC Commissioner's role in this matter." (Op. P. 6, Par. 2) and especially when it opined "there is no evidence he [Respondent's Commissioner/Attorney General] discussed the underlying case with the Hearing Officer." (Op. P. 7, Par. 3, Lines 5-6) as Petitioner believes Officer Knight's "tone" in his November 4, 2003 Letter proves he was also improperly influenced and Petitioner also believes Officer Knight would not have had that "tone", if the case had not been improperly discussed with him when he met with the Commissioner. (App. G. pp. 106a-107a).

Petitioner respectfully requests that this Honorable Court read Hearing Officer Knight's November 4, 2003 Letter and decide if it believes Petitioner's beliefs as Petitioner has included the Letter in the Appendix (App. G, pp. 106a-107a) and it was also in the S.C. Supreme Court's case Record as page 1957, and then, if this Honorable Court's belief is the same as Peti-

tioner's, it should reverse the S.C. Supreme Court's Opinion No. 26317.

6. Whether the South Carolina Supreme Court erred in its Year 2007 Opinion by applying a newly enacted Year 2006 (Republican Party controlled Legislature's written) Securities Law to "lend guidance" to interpreting the repealed (but in effect when this Year 2003 case started) Year 2002 (Democratic Party controlled Legislature's written) Securities Law to opine, "Clearly, it appears the (Year 2005/2006) Legislature intends a Strict Vertical Commonality Test to apply." after which the Court then opined that such [new] Test made Petitioner's "Agency Contract" (App. B. pp. 57a-62a) (Agency-For-Hire) a "common enterprise" (the second of three elements or prongs making up "securities" called Investment Contracts) and, if all three (3) elements are present, therefore, a "security".

Because this Honorable Court has already reviewed Petitioner previously presented Question #1, hopefully this Court has already determined that based on EGA, *supra,* the first required element or prong of an Investment Contract, "an investment of money", does not exist in Petitioner's case and, pursuant to ETS, *supra,* which opined, "every one (1) of the three (3) elements of *Howey* must be present in order to be an Investment Contract and, if one is not fully satisfied [such as "no investment of money" as in Petitioner's case] then there is no Investment Contract and this Honorable Court has already decided it must reverse the S.C. Supreme Court's Opinion No. 26317, this Court need not spend anymore time on this case.

However, just in case, Petitioner will argue Question #6 by emphatically stating: "Petitioner's Individually

Contracted "Agency Contract" with each individual Principal involves no "common enterprise" (the second of the three elements required to be an Investment Contract) as required by *SEC v. W.J. Howey Co.* "HOWEY", 328 U.S. 293 (1946) the "premier" seminal securities ruling because it is quoted in almost every Court case dealing with securities and almost all of the States have included the *Howey* definition of an Investment Contract as their Code language and, as late as Year 1998, the 4th. Circuit, which interprets the laws of South Carolina, North Carolina and Virginia, recognized *Howey* in *Joseph W. Teague v. James O. Bakker,* 35 F.3d 978, 981-985 (4th Cir. 1994), cert. denied, 513 U.S. 1153, 130 L.Ed.2d 1073, 115 S.Ct. 1107 (1995) and affirmed in 1998 U.S. App. Lexis 7079; Fed. Sec. L. Rep. (CCH) P90, 182 Decided April 8, 1998; cert denied October 13, 1998, reported at: 1998 U.S. Lexis 6478) so Petitioner believes, contrary to the S.C. Supreme Court's Opinion, the *Howey* definition of a "common enterprise" controls this Year 2003 case.

Additionally, pursuant to *Milnarik v. M-S Commodities, Inc.,* 497 F.2d 264; 1972 U.S. App. LEXIS 11590; Fed. Sec. L. Rep. (CCH) P93, 355 which opined, "We do not believe an investor who grants discretionary authority to his agent thereby joins the agent's other customers in the kind of common enterprise that would convert the agency relationship into a statutory security [Investment Contract]." and *Moulin v. Der Zakarian,* 191 Cal. App. 2d 184, 12 Cal. Rptr. 572 (4th. Dist. 1961) which opined, 'While the investor client [employer] may not have control over the physical activities of the agent, the very act of turning over discretion can be viewed as an exercise of the control vested in the principal [employer] client.' Plus, *Restatement of*

Agency section 146 (1957). Plus, The United Comptroller of the Currency, pursuant to his April 1996 Interpretive Letter No. 717, opined: (1) TLCs were "an extension of credit by the government to the delinquent tax payer" and, therefore, "TLCs were not an investment security"; so, (2) Banks could purchase and own TLCs as income producing assets; as The Comptroller, (3) Considered TLCs, with proper procedures followed by a Bank, to have "no real risk".

Therefore, based on case law and recognized authorities, Petitioner's "Agency Contract" with each individual Principal involves no "common enterprise" and, therefore, pursuant to *ETS, supra.*, due to the lack of this, the second of three required elements in an "Investment Contract", this Honorable Court must reverse the S.C. Supreme Court's Opinion No. 26317.

7. Whether the South Carolina Supreme Court erred when it opined that Petitioner's marketing material stating, "we do all the work" meant Petitioner made the "essential managerial efforts which affect the failure or success of the enterprise" (the third of three elements or prongs making up "securities" called Investment Contracts) and, if all three (3) required elements are present, a "security" called Investment Contracts, under Title 15 U.S.C. §77(b) and S.C. Code Ann. §35-1-20(15)?

Petitioner per its Agency Contract is hired by its employer/principal to do the travel and other physical work for the employer/principal but the employer, like all bosses, works as they make all the important decisions (mental work) and tells Petitioner what to do and when to do it. Even the Agency Contract states Petitioner must follow its employer's "specify criteria" as

to the TLCs Petitioner bids on and tries to purchase directly for his employer/principal with the principals' investment check always made payable only to the government selling the TLC – not Petitioner or his company. Petitioner's Employer makes many other decisions as well as all selling decisions. And, per the Agency Contract, "Once any TLC matures, if ever, Employer shall promptly commence a good faith effort to secure a Tax Deed and then proceed to convert that Deed into a good and marketable (insurable) Title and/or offer and sell any TLC, matured TLC, Tax Deed Title and/or Insurable real property title as a whole." Profits are therefore determined largely by the Employer/Principal/Investor as the faster they perform, the potential profit or yield should be higher. Pursuant to the Agency Contract between Petitioner and its employer, it is very clear there is not an expectation of profits solely or derived from efforts of others as Petitioner's Employer make the essential decisions (mental work) vs. Petitioner's physical work.

And there is no "common enterprise" that Petitioner is part of. In *SEC v. Energy Group ("EGA"), supra,* the Court even acknowledged that EGA played some role in the success of the customer/investor in winning the oil lease because EGA recommended oil leases to bid on, but found that this role was not significant enough to satisfy the *Howey* test for an Investment Contract. Also see *Yeoman v. State of Florida Department of Banking and Finance,* 452 So.2d 1011 (FL. 1984) a case which followed the holding of *SEC v. EGA, supra* on virtually similar facts.

Additionally, when the Employer/Principal purchases TLCs, profits are basically automatic as real estate Tax Lien Certificates (TLCs), by State Law, always pay interest (profit) if redeemed (paid off) or the TLC owner will receive a property deed to the property at a cost of less than the property is worth because the selling Government basis the TLC cost on a small percentage, usually 1% - 5% (Just look at your own home's property tax bill!) of the appraised value of the property securing the TLC, so there is no expectation of profits solely from the efforts of Petitioner as his Employer will always make a profit from just buying Government sold real estate Tax Lien Certificates (TLCs) and that's the reason the United States Comptroller General, pursuant to his April 1996 Interpretive Letter No. 717, opined: Banks could purchase and own TLCs as income producing assets; as The Comptroller considered TLCs, with proper procedures followed by a Bank, to have "no real risk" and this Honorable Court should take Judicial Notice that Federally controlled Banks just don't take any "real" risks!

Petitioner's arrangements with its employers are fee-based agency-for-hire agreements rather than securities; and, clearly, Petitioner's agency-for-hire program does not fit the *Howey; Forman* test nor any other Court approved test for any element making up an Investment Contract.

Therefore, Petitioner's employment and agency agreement is not a [Investment Contract] security and this Honorable Court should reverse The South Carolina Supreme Court's Opinion No. 26317 in its entirety.

CONCLUSION

For all the reasons stated above, The State of South Carolina Supreme Court's Opinion No. 26317 should be reversed and, hopefully this Honorable Court will issue some type of Opinion wherein it states that the Respondent violated Petitioner's Constitutional Due Process and other rights as stated herein.

Respectfully submitted,

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August 21, 2007